

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PORT OF SEATTLE,

Plaintiff,

v.

THE BOEING COMPANY,

Defendant.

No. 2:22-cv-00993-RAJ

**THE BOEING COMPANY'S
REPLY IN SUPPORT OF
MOTION TO STAY**

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(No. 2:22-cv-00993-RAJ)

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Phone: +1.206.359.8000
Fax: +1.206.359.9000

INTRODUCTION

This case should be stayed for eight months to allow Boeing and the other allocation participants to complete their eight-year allocation process, reach settlements with each other, and enter a consent decree with the EPA for the cleanup of the Lower Duwamish Waterway. The settlements and consent decree will dramatically reshape this lawsuit by finalizing shares of responsibility for dozens of parties, making it enormously inefficient to proceed now instead of staying the case for a mere eight months. Commencing litigation now will also imperil the allocation and settlement process because Boeing will face significant pressure to withdraw from the process and join the allocation participants as parties to this lawsuit.

The Port suggests (at 6) that Boeing wait to join other parties because nothing much will happen in this case between now and April. This dubious suggestion shows how little a stay will harm the Port. Since the Port has excluded itself from the negotiations that the other allocation participants are having with the EPA about the performance and payment for the remaining cleanup, it is highly unlikely that the Port will establish that it has paid more than its fair share; Boeing will prove at trial that the opposite is true. But, even if the Port establishes that it overpaid, CERCLA allows the Port to be “made whole” because it authorizes the recovery of interest.

ARGUMENT

A. These proceedings will be significantly impacted by the resolution (or not) of the ongoing allocation and settlement process.

The Port grossly oversimplifies the allocation this case will require, claiming it “involves weighing facts and equitable factors only as between Boeing and the Port” (at 8) and that Boeing “would not be stuck with 100 percent of the Port’s past costs” (at 7). But as the Port acknowledges (at 8), it “seeks cost recovery from Boeing and, at this time, Boeing alone.” That is, the Port seeks to recover *solely from Boeing* everything the Port has paid, and what it will pay in the future, above what it believes is its fair share of costs—not just Boeing’s equitable share of what the Port believes it has overpaid. *E.g.*, Compl. ¶¶ 32, 35, 93.

1 The Port might think that its tunnel-visioned focus on Boeing is equitable. The Supreme
 2 Court disagrees. The Court has observed that “[a] district court applying traditional rules of equity
 3 would undoubtedly consider any prior settlement as part of the liability calculus.” *United States v.*
 4 *Atl. Rsch. Corp.*, 551 U.S. 128, 141 (2007). And many other courts have reasoned ““that a fair and
 5 equitable allocation [can] only be achieved by comparing [a defendant’s] role as a PRP [potentially
 6 responsible party] to other PRPs.”” *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 19 (1st Cir. 2004)
 7 (third alteration added) (citation omitted). Indeed, in other cases where a PRP plaintiff chooses—
 8 as the Port has—to sue only one other PRP, courts have found it more equitable to leave the burden
 9 of that decision on the plaintiff, rather than shifting all costs sought onto the lone defendant. *E.g.*,
 10 *City of Bangor v. Citizens Commc’ns Co.*, 437 F. Supp. 2d 180, 225 (D. Me. 2006); *In re Kaiser*
 11 *Gypsum Co.*, No. 16-31602, 2020 WL 6737641, at *19–20 (W.D. N.C. Nov. 13, 2020).

12 The Port cannot forcibly narrow the inquiry in an equitable allocation simply because it
 13 was easier for the Port to sue only Boeing for all the costs it seeks. Boeing and the Port are not
 14 solely responsible for all of the contamination of the waterway. Forty-three other parties
 15 contributed to the contamination, and after an eight-year allocation process, Boeing and other
 16 participants have accepted their allocated shares in the private allocation. Dkt. No. 12 at 2 ¶ 7.
 17 Their shares are relevant to an equitable allocation of what the Port believes it has overpaid. The
 18 difference, importantly, is that an allocation will be significantly more difficult, and discovery
 19 along the way more uncertain and burdensome, if the Port can rush this proceeding before the other
 20 parties’ shares are finalized.

21 If the shares of the additional allocation participants are finalized in settlements between
 22 those parties and with the EPA, then this Court can allocate what the Port has overpaid (if anything)
 23 with the benefit of evidence about other parties’ agreed-to shares. At that point, the Court will have
 24 more clarity about the equitable redistribution of anything the Port has overpaid, and the Court
 25 will be better-equipped to consider the responsibility of non-parties. Where, as here, another
 26 proceeding may significantly affect the issues to be decided, a stay is appropriate—as judges in

1 this district have recognized. *See Naini v. King Cnty. Pub. Hosp. Dist. No. 2*, No. C19-0886-JCC,
 2 2020 WL 468910, at *3 (W.D. Wash. Jan. 29, 2020); *Washington v. Trump*, No. C17-0141JLR,
 3 2017 WL 2172020, at *3 (W.D. Wash. May 17, 2017).

4 That makes this case far different than *Columbia Falls Aluminum Co. v. Atlantic Richfield*
 5 *Co.*, No. 18-cv-131, 2020 WL 4382481 (D. Mont. July 31, 2020). *Columbia Falls* also involved
 6 the equitable allocation of liability for contamination at a Superfund site. *See id.* at *1–3. But
 7 unlike here, the defendant did not ask the Court to stay the case pending the negotiation of a
 8 consent decree that would determine the liability of many parties (including the defendant)
 9 between each other and the government for contamination at the site. Instead, the defendant asked
 10 the Court to stay the case while the EPA *selected a remedy* (i.e., decided how to best address the
 11 contamination). *See id.* at *3. The Court concluded a stay was not warranted because (a) a court
 12 can allocate the percentage of liability between parties before the government approves a
 13 remediation plan and (b) the nature of a remediation plan is irrelevant to a party’s liability. *See id.*
 14 A court-approved consent decree, by contrast, will be relevant to the allocation of liability between
 15 Boeing and the Port. Consequently, a stay is warranted here. *See Confederated Tribes & Bands of*
 16 *Yakama Nation v. Airgas USA, LLC*, 435 F. Supp. 3d 1103, 1128 (D. Or. 2019) (“Plaintiff’s claims
 17 here present some of the same complex legal and factual issues that are presented by the ongoing
 18 non-judicial allocation process.”).

19 The Port ignores (at 5) how this case is unique, in large part, because of its own actions. In
 20 a typical case, this Court would have all identifiable PRPs before it. And because of that, and
 21 because the Port’s claim as a fellow PRP itself is for several liability only, the Court would be
 22 faced with “effectively a contribution suit between and among potentially responsible parties,”
 23 “including the party that filed the § 107(a) action.” Minute Order at 1–2, *Seattle Times Co. v.*
 24 *LeatherCare, Inc.*, Case 2:15-cv-01901-TSZ, (W.D. Wash. Oct. 3, 2017), ECF No. 99. But the
 25 Port has sued only Boeing, apparently to try to force on Boeing the burden of proving the
 26 responsibility of other parties—something those parties would normally be present to show—in

1 order to prove Boeing's own equitable share vis-à-vis those other parties. The Court should
 2 consider the responsibility of *all* parties for the contamination at the Lower Duwamish Waterway,
 3 and it will be easier and more efficient to do so in light of final settlements and a consent decree
 4 with the EPA.

5 The calculation here is simple. A temporary pause ensures that this Court can efficiently
 6 consider the best evidence of what's equitable in this unique and complex case, rather than forcing
 7 the Court to wade into (and Boeing to argue about) that complexity while the facts are still in flux.
 8 The alternative is to proceed now with litigation between all of the parties, needlessly complicating
 9 this matter and potentially further delaying an environmental remedy.

10 **B. A stay is needed to protect the ongoing allocation and settlement process.**

11 A stay is also necessary to protect the settlement and allocation process itself. Boeing, the
 12 other allocation participants, and the Port devoted eight years and millions of dollars to a thorough
 13 and comprehensive allocation process, resulting in an over 4,000-page decision from the allocator
 14 assigning shares of responsibility to each allocation participant. As the Port makes clear (at 2), the
 15 Port has rejected its share. The Port was within its rights to decline the share assigned to it, but its
 16 lone wolf choice should not topple the multi-year allocation process.

17 As explained in the Declaration of King County's Dwight Dively and the statements of
 18 support from the City of Seattle and 28 other allocation participants, litigation among the
 19 participants likely would terminate the settlement negotiations. The following is just a sampling
 20 of their concerns:

- 21 • King County: litigation among allocation participants "would jeopardize these ongoing
 22 settlement negotiations at this critical juncture." Dkt. No. 11 at 2 ¶ 8.
- 23 • City of Seattle: third-party claims "likely would interfere with and potentially would end
 24 settlement negotiations." Dkt. No. 12-3 at 2.
- 25 • Northwest Container Services, Inc.: "[F]ocused efforts over the next few months will allow
 26 the allocation parties to reach cash-out settlement agreements and for the allocation

1 participants and EPA and DOJ to negotiate and execute a consent decree that will end
 2 NWS's involvement at the site without litigation." Dkt. No. 12-10 at 2.

- 3 • Manson Construction Co.: "It would be a serious injustice to force the de minimis parties
 4 who have engaged in the Allocation process for the last eight years to now start over in
 5 litigation." Dkt. No. 12-15 at 2.
- 6 • Counsel for 12 parties: A stay will "facilitate the consent decree process and will likely
 7 avoid a multi-party lawsuit that would unnecessarily waste judicial resources and cause the
 8 parties who participated in good faith in an eight-year allocation process to incur additional
 9 attorneys' and expert fees." Dkt. No. 12-20 at 2.

10 The Port misses the point with its argument (at 5) that Boeing will not be "forced" to
 11 immediately add third parties if a stay is denied. The Port seeks to put Boeing alone in jeopardy of
 12 shouldering a disproportionate share of past costs and a greater-than-equitable share of costs for
 13 the future remedy. Boeing cannot take the risk of litigating the Port's theory without the certainty
 14 of final settlements this Court can consider in an allocation or the presence of all parties ensuring
 15 equitable contribution between all parties. This predicament is what led the court in *Yakama Nation*
 16 to stay the case to avoid disrupting a non-judicial allocation process. *See* 435 F. Supp. 3d at 1128.

17 Even if Boeing could wait months to bring contribution claims against the other allocation
 18 participants (an option that presumably was available to the defendants in *Yakama Nation*), forcing
 19 Boeing to wait is both inefficient and inequitable. The case will be significantly disrupted if parties
 20 are added after discovery has begun and dispositive motions have been filed. The joined parties
 21 will also be prejudiced if the Court does not postpone the proceedings, because they will lose out
 22 on months during which they could have brought motions and engaged in discovery. And to the
 23 extent a party is harmed if it must wait to litigate a claim, Boeing faces the same harm from a self-
 24 imposed stay that the Port faces from a court-issued one. Rather than prioritize the Port's claims
 25 over Boeing's, the Court should require both parties to litigate their claims after the eight-year
 26 settlement and allocation process is complete.

1 **C. A slight delay will not meaningfully harm the Port at all.**

2 These potential harms and inefficiencies far outweigh the minimal harm that a short stay
3 might cause the Port. Citing a district court case from California, the Port insists that a delay in
4 monetary recovery “constitute[s] . . . some damage” (at 4). But the “damage” the Port might suffer
5 is not *meaningful* because, as Judge Coughenour explained in *Naini*, “money damages compensate
6 a plaintiff for their injury regardless of when the money damages are awarded.” 2020 WL 468910,
7 at *2. Which is why this Court held that “a potential delay in the recovery of money damages, . . .
8 on its own, is insufficient to warrant denial of a stay.” *Ten Bridges LLC v. Hofstad*, No. 19-cv-
9 01134-RAJ, 2020 WL 6685153, at *2 (W.D. Wash. Nov. 12, 2020).

10 The Port tries to get around this issue by pointing out that it “seeks correction of both past,
11 *and present, ongoing* economic injuries” (at 4). But any future judgment will fully compensate the
12 Port for the money it might spend in the next eight months, *with interest*, so the logic from *Naini*
13 should still govern. *See* 42 U.S.C § 9607(a) (allowing a party to recover interest). None of the
14 cases cited by the Port excuse its failure to quantify the harm it might suffer from a stay. In *Trotsky*
15 *v. Travelers Indemnity Co.*, No. C11-2144-JCC, 2013 WL 12116152, at *3 (W.D. Wash. Apr. 5,
16 2013), Judge Coughenour said the plaintiff’s request for prospective relief weighed only “slightly”
17 against a stay. In *North Fork Rancheria of Mono Indians of Cal. v. California*, 15-cv-00419-AWI-
18 SAB, 2016 WL 4208452, at *7 (E.D. Cal. Aug. 10, 2016), a favorable judgment would not have
19 compensated the plaintiff for the gaming revenue it would have lost while a stay was in place.
20 Likewise, in *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005), a favorable judgment
21 would not have compensated the third-party electricity consumers who faced substantial “ongoing
22 and future harm” from the defendant’s “illegal concentration of market power.”

23 **CONCLUSION**

24 The Court should stay this case for eight months. Staying the case will protect the allocation
25 and settlement process and save party and judicial resources without harming the Port.

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2 By: s/ Mark W. Schneider
3 Mark W. Schneider, WSBA No. 14105
4 Kathleen M. O'Sullivan, WSBA No. 27850
5 Meredith R. Weinberg, WSBA No. 45713
6 Katherine E. Page, WSBA No. 32903
7 Marten N. King, WSBA No. 57106
8 **Perkins Coie LLP**
9 1201 Third Avenue, Suite 4900
10 Seattle, Washington 98101-3099
11 Telephone: +1.206.359.8000
12 Facsimile: +1.206.359.9000
13 MWSchneider@perkinscoie.com
14 KOSullivan@perkinscoie.com
15 MWeinberg@perkinscoie.com
16 KPage@perkinscoie.com
17 MKing@perkinscoie.com

18 Attorneys for Defendant
19 The Boeing Company
20
21
22
23
24
25
26